

**COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE**
WILMINGTON, DELAWARE 19801

John K. Welch
Judge

April 28, 2010

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Re: *State of Delaware v. Marlon O. Allen*
Case No.: 0902019514

Date Submitted: April 20, 2010

Date Decided: April 28, 2010

MEMORANDUM OPINION

Dear Counsel:

A Motion to Exclude was docketed and heard in the above captioned matter on April 20, 2010 on the Criminal Motion Calendar in the Court of Common Pleas, New Castle County, State of Delaware. Following oral argument the Court reserved decision. This is the Court's Final Decision and Order on Defendant's Motion.

I. The Facts.

Defendant Marlon Allen (the "defendant" or "Allen") was charged by Information by the Attorney General filed with the Clerk of the Court of New Castle County with one Count Driving Under the Influence of Alcohol ("DUI") allegedly in

violation of Title 21, Section 4177(a) of the Delaware Code of 1974, as amended.¹ Allen filed a pre-trial Motion for sentencing purposes to exclude a prior DUI conviction from the state of New Jersey. Allen contends in his Motion that the New Jersey DUI statute is substantially different from 21 *Del. C.* §4177(a) and therefore cannot be considered a prior conviction from “a similar statute of another state” within five (5) years. *See*, 21 *Del.C.* §4177B(e)(2). In a written response, the State disagrees and argues that Defendant’s prior New Jersey conviction should, in fact, constitute a prior conviction for sentencing purposes because it is a prior conviction from a jurisdiction with a “same or a similar statute” within a five (5) year period immediately proceeding the date of the present offense. *See* 21 *Del. C.* §4177B(e)(2).²

For the reasons outlined below, this Court holds the relevant portion of the New Jersey’s DUI statute which defendant was actually convicted, and hence the New Jersey statute, is substantially similar to Delaware’s DUI statute and therefore under existing Delaware case law “is a same or similar statute” and may be considered as a prior conviction for sentencing purposes. *See e.g., Stewart v. State of Delaware*, 930 A2d 932 (Del. 2007); *Rogers v. State*, 2001 WL 139583 (Del. Supr.)(DelPesco, J.). Second, alternatively, the Court finds that because the subsection of the New Jersey statute which arguably may be dissimilar is not the subsection for which defendant was not convicted, and therefore may not be used as a basis to use exclude his prior

¹ Defendant was also charged by Information with speeding in violation of 21 *Del.C.* §1469(a)(4) and an insurance card violation, 21 *Del.C.* §2112(b).

² Defendant does not dispute, nor is it an issue, when the five (5) year period begins in this case. *See*, e.g. *State v. Kimberly Thoroughgood*, 2009 WL 350802 (Del.Com.Pl.) (Welch, J.)

conviction for DUI in new Jersey. Therefore, this Court concludes for the reasons below, a qualifying DUI conviction from New Jersey is considered a prior offense for sentencing purposes in Delaware. *See*, 21 *Del.C.* §4177B(e)(2).

II. The Law.

Under Delaware law, a person convicted of a second offense DUI is subject to enhanced penalties.³ A prior conviction is defined as “[a] conviction pursuant to §4175(b) or §4177 of [Title 21], *or a similar statute of any state*” occurring within five years of the present offense.⁴ Delaware’s DUI statute, 21 *Del. C.* §4177(a) provides, in relevant part as follows:

- (a) No person shall drive a vehicle:
 - (1) When the person is under the influence of alcohol;
 - (2) When the person is under the influence of any drug;
 - (3) When the person is under the influence of a combination of alcohol and any drug;
 - (4) When the person’s alcohol concentration is .08 or more; or
 - (5) When the person’s alcohol concentration is, within 4 hours after the time of driving .08 or more.⁵

New Jersey’s DUI statute, at the time of Defendants conviction provided, in part, reads as follows:

- (a) Except as provided in subsection (g) of this section, a person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant’s blood or permits another person who is under the influence of intoxicating liquor,

³ 21 *Del. C.* § 4177(d)(2).

⁴ 21 *Del. C.* §4177B(e) (*emphasis added*).

⁵ 21 *Del. C.* §4177.

narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood shall be subject:

(1) For the first offense:

(i) if the person's blood alcohol concentration is 0.08% or higher but less than 0.10%, or the person operates a motor vehicle while under the influence of intoxicating liquor, or the person permits another person who is under the influence of intoxicating liquor to operate a motor vehicle owned by him or in his custody or control or permits another person with a blood alcohol concentration of 0.08% or higher but less than 0.10% to operate a motor vehicle, to a fine of not less than \$250 nor more than \$400 and a period of detainment of not less than 12 hours nor more than 48 hours spent during two consecutive days of not less than six hours each day and served as prescribed by the program requirements of the Intoxicated Driver Resource Centers established under subsection (f) of this section and, in the discretion of the court, a term of imprisonment of not more than 30 days and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of three months[.]⁶

III. Discussion.

In comparing a statute for the purpose of determining whether it is pursuant to a same or similar statute, Delaware law provides it is the 'prohibited behavior' that must be similar.⁷ "The word similar means, 'nearly corresponding; resembling in many respects; having a general likeness, although allowing for some degree of difference.'"⁸ A plain reading of the Delaware and New Jersey DUI statutes reveals

⁶ N.J. STAT. ANN. § 39:4-50(a) (2004).

⁷ *State v. Rogers*, 2001 WL 1398583 (Del. Super.).

⁸ *Id.* (quoting *Black's Law Dictionary* 1383 (6th ed. 1990)).

many similarities. Delaware and New Jersey's DUI statutes prohibit driving under the influence of alcohol and drugs and set the presumptive level of impairment at 0.08% blood-alcohol level. However, as Defendant noted, the New Jersey statute does prohibit certain conduct for which the defendant, however, was not, in fact convicted which is not prohibited under the Delaware statute. 21 *Del.C.* §4177(a). Specifically, the New Jersey statute prohibits a person who owns or is in custody or control of a vehicle from allowing an intoxicated individual to drive that vehicle and sets forth criminal penalties for this violation. The issue before the Court is whether the additional conduct prohibited by the New Jersey statute makes the Delaware and New Jersey statutes dissimilar; or as the case law and statute provide, not the same or similar. It does not.⁹ The Delaware DUI statute does not require similar statutes from other states to be identical. "In comparing a statute for the purpose of determining whether it is pursuant to a similar statute, it is the prohibited behavior that must be similar, not the evidentiary standard by which the act is proven."¹⁰ The Court finds the relevant portions of the New Jersey and Delaware DUI statutes are, in fact, similar and a DUI conviction from New Jersey may qualify as a prior offense pursuant to 21 *Del. C.* §4177B(e).

⁹ See *Logullo v. State*, 1997 WL 366852 (Del. Super.) (Superior Court affirmed decision of Court of Common Pleas where Judge took judicial notice of New Jersey DUI statute and held that New Jersey DUI statute and Delaware DUI statutes were similar).

¹⁰ See *State v. Werell*, Ct.Comm.Pl., Cr.A. No.: 85-11—178, trader, J. (September 11, 1986) at 2 (citing *State v. Geyer*, 355 N.W.2nd 460, 461 (Minn.Ct.App. 1984); *State v. Rogers*, 2001 WL 1398583 (Del.Supr.) DelPesco, J.

In *Stewart v. State*, the Delaware Supreme Court held that “a prior offense under a ‘similar statute’ *may* be established under Title 21, section 4177B(e) of the Delaware Code without reference to the facts and circumstances of that offense.”¹¹ The permissive language allows the Court to sentence without considering the facts and circumstances of the previous conviction if the statutes are similar. In this case, the Court has not considered the facts of the case, but has made a “limited inquiry” by reviewing the State’s Exhibit “A” and concluded, in fact, the defendant was convicted of operating a motor vehicle under the influence in a State similar to Delaware. The State attached a copy of the complaint from Defendant’s New Jersey DUI to its brief. That filing indicated that the Defendant in this action did operate a vehicle under the influence in New Jersey; conduct that is prohibited by the Delaware DUI statute. In short, any dissimilar provisions in the New Jersey’s statute does not apply here.

The Court must note that the defendant did not represent in his filing with this Motion to Exclude that he had been “convicted by allowing another person to drive or operate his motor vehicle”. Appended as an Exhibit to the State’s Answer to Defendant’s Motion, the Attorney General points out defendant violated N.J.S.A. §39:4-50(a) which provides a person may be convicted who “operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug.” Exhibit “A”. The Hamilton Township Municipal Court certified

¹¹ *Stewart v. State*, 930 A.2d 923, 926 (Del. 2007) (*emphasis added*).

records show the arresting officer circled “operate” on defendant’s Complaint-Summons “driving while intoxicated”.

Therefore defendant’s prior conviction in New Jersey may be considered at sentencing if defendant is, in fact, convicted and defendant may be subject to the enhanced penalties contained in 21 *Del.C.* §4177B(e)(2).¹² Defendant’s Motion to Exclude is DENIED. Each party shall bear their own costs.

The Criminal Clerk shall forthwith schedule the matter for trial.

IT IS SO ORDERED this 28th day of April, 2010

John K. Welch
Judge

/jb

cc: Charmar Jones, Intake Case Processor
CCP, Criminal Division

¹² It must be noted that trial has not even taken place in the instant action and no adjudication of guilt has been entered by this Court.